IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 76 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHIRU SAVJI KOLI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 76 of 1997

MR KB ANANDJIWALA for Appellant No.

MR RC KODEKAR, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 14/03/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant is original accused of Sessions Case No. 20 of 1996 tried in the Court of learned Additional Sessions Judge, Morbi. He has been convicted for committing offence under section 302 of the Indian Penal Code [IPC] and sentenced to suffer imprisonment for life and to pay fine of Rs.100/=, in default simple imprisonment [SI] for 3 days, by judgment and order of conviction and sentence dated 1/1/1997.

2. According to prosecution, the appellant was married to the deceased about 7 years prior to the present incident and they had a son aged 6 years named Jitendra and daughter aged 1 year named Sonal. It is the case of the prosecution that the appellant was constantly ill-treating the deceased and on the day of incident also in the morning about 7.00 O'clock he had beaten her. The deceased therefore, told the appellant, in exasperation that why he was ill-treating her and beating her and if he did not like her, he should kill her. According to the prosecution, the appellant immediately poured kerosene over her and ignited her with match-stick. Since the deceased could not bear the pain, she raised screams and on hearing the same, labourers working in the nearby factory rushed to the spot. She was taken to the Civil Hospital at Morbi by the appellant. It appears that before the Medical Officer it was stated that the deceased had received accidental burns since her clothes had caught fire while she was preparing tea. Police Sub Inspector, Nandasana also received telephone on the day of incident i.e. 25th December, 1995 from the Medical Officer informing about the admission of deceased in the hospital with burns. He, therefore, reached the hospital at about 10.30 a.m. However, the treatment of deceased was already going on, he waited outside the ward for about 2 to 2.1/2 hours.

2.1. It also appears that in the meanwhile one Manubhai Becharbhai Ujariya, Deputy Mamlatdar attached to the office of Mamlatdar at Morbi received written intimation informing him that he was required to record dying declaration of the deceased Bai Ramila. The intimation was received at about 10.25 a.m. He, therefore, immediately proceeded to the hospital and contacted Dr. Bhadja who was present in the Burns Ward. He informed Manubhai that the deceased was conscious and was in a position to give answers. He, therefore, commenced questioning the deceased by introducing himself as the Executive Magistrate. It further appears that in

the dying declaration also in earlier part the deceased stated that she had received burns while preparing tea. However, in answer to the last question i.e. 14th question, she stated that the appellant was continuously harassing her and he ultimately on the day of incident, poured kerosene over her and ignited her. After recording the dying declaration the Executive Magistrate Manubhai left the place. Later on P.S.I. Nandasana contacted the deceased and recorded her complaint wherein she stated that because of the constant quarrel with her husband, she had told him that if he did not like her, he should kill her and, therefore, the appellant poured kerosene over her and set her ablaze. After recording the complaint, P.S.I. Nandasana forwarded it to the City Police Station, Morbi, which was registered at C.R. No. 0/95 for offences under sections 498-A and 307 of the IPC. However, since the incident had occurred within the jurisdiction of Morbi Taluka Police Station, the case was transferred to the said police station from City Police Station, where it was registered as C.R. No. 159/1995 at about 15.45 hours.

2.2. The further investigation was thereafter conducted by P.S.I. Mr. S.L. Zala. During the course of investigation Mr. Zala drew necessary panchnamas including the panchnama of scene of offence, the inquest panchnama, panchnama of seizure of clothes, etc. He also recorded statements of various persons. On 26th December, 1995 at about 0.15 hours he arrested the appellant. On 27th December, 1995 Ramilaben expired and, therefore, P.S.I. Zala added offence under section 302 of the IPC and forwarded the Muddamal to the Forensic Science Laboratory. Upon receiving the report and completing the investigation Mr. Zala submitted the charge-sheet against the appellant in the Court of the learned Judicial Magistrate First Class at Morbi. Since the offence under section 302 is exclusively triable by the Court of Sessions, the Ld. Magistrate committed the case to the Court of Sessions.

2.3. At the trial, the learned trial Judge framed charge at Exh. 1 on 5th August, 1996 for offence under section 302 of the IPC. The appellant pleaded not guilty and claimed to be tried.

3. To substantiate its case, the prosecution examined 10 witnesses and also placed reliance on documentary evidence such as the F I R, the P M report, the panchnamas, etc. At the end of the recording of the evidence, the appellant was given opportunity to explain the circumstances appearing against him in the evidence

by recording his further statement under section 313 of the Code of Criminal Procedure. His defence appears to be that of general denial. At the end of the trial, the learned Judge, on the basis of the evidence led by the prosecution, came to the conclusion that it was able to prove its case against the appellant beyond any reasonable doubt. He, therefore, convicted the appellant for offence under section 302 of the IPC. He thereafter heard the appellant on the question of sentence, who pleaded that he had small children and the Court may show leniency in the matter of sentence. Ultimately the learned Judge by judgment and order of conviction dated 1/1/1997 convicted him for offence under section 302 of the IPC and sentenced him to suffer imprisonment for life and to pay fine of Rs.100/=, in default SI for 3 days. It is this judgment and order of conviction and sentence which are challenged before us in this appeal.

4. Mr. K B Anandjiwala, learned advocate for the appellant has submitted before us that the relations between the couple were cordial and there was no reason for the appellant to commit the crime. He has further submitted that there is no direct evidence and the circumstantial evidence led by the prosecution does not positively point to the guilt of the appellant. He has further submitted that had there been any quarrel on the fateful day, atleast the neighbours would have heard some hot altercations between the couple. But there is no such evidence on record. He has also submitted that the defence had examined father of the deceased in whose neighbourhood the appellant and deceased stayed for about 9 years and he has stated that the relations between them were cordial. He has also submitted that as per the initial version given in the dying declaration and also before the Medical Officer by the deceased herself, it is a case of accidental death and not homicidal. He, therefore, submits that this appeal deserves to be allowed.

4.1. As against that, Mr. R C Kodekar, Ld. APP has supported the judgment. He has submitted that the prosecution has led adequate evidence to prove the guilt of the appellant beyond any reasonable doubt and hence he has been rightly convicted for committing offence under section 302 of the IPC. He, therefore, submits that this appeal has no merits and it deserves to be dismissed.

5. With a view to reappreciate the evidence, we have carefully gone through the record. We have also considered the rival submissions. It is clear that the deceased has died unnatural death on account of the

burns. It is, therefore, necessary for us to first decide whether the death was accidental or homicidal or suicide. The evidence of Dr. Pragjibhai Jethabhai Bhadja, P W 6 Exh. 19 shows that on 25th December, 1995 Ramilaben i.e. deceased was brought to the hospital. He had examined her. She was fully conscious. She was able to speak and also able to understand. In his presence the Executive Magistrate had gone to record the dying declaration. While the dying declaration was being recorded, he was present. Even at that time the patient i.e. the deceased was conscious and able to answer the questions put to her by the Magistrate. After completion of the recording of the dying declaration, he had appended his signature below it. He also made an endorsement stating that the patient was conscious when the dying declaration was recorded. He has been cross-examined by the defence. In the cross-examination he has been asked to produce the case papers of OPD as well as indoor case papers. He has stated that after examining Ramilaben he thought it desirable to admit her in the hospital. The history written in the case papers, according to this witness, has been given by the relative of the deceased. As per that information the deceased had received burns while she was preparing tea about two hours prior to her admission in the hospital. He has, however, denied the suggestion made by the defence lawyer that while recording of the dying declaration was in progress, the Police Officer had entered the ward and he had asked the Magistrate to make necessary changes in the dying declaration which could be in consonance with the purpose stated in the complaint. This suggestion has been denied by the witness.

5.1. P W 5 - Manubhai Becharbhai Ujariya, Exh. 15, who was working as Deputy Mamlatdar in the office of Mamlatdar at Morbi has stated that on 25th December, 1995 he had received intimation to record dying declaration of one Ramilaben, wife of Dhirubhai Koli at about 10.25 a.m. On receipt of the intimation he had proceeded to the hospital and had contacted Dr. Bhadja who happened to be there in the burns ward. His evidence shows that he had inquired about the name, address, etc. of the patient i.e. Ramilaben and she had answered all the questions properly. He has further stated that when he had asked why she received the burns, she had stated that while she was lighting the primus for preparing tea, her clothes caught the flame and she received burns. He has also stated that the patient had told him that at that time her husband and two children were in the house. She had also stated that her husband brought her to the hospital. This witness further states that he had asked whether

there was any quarrel with her husband, then she had stated that her husband i.e. appellant was giving her mental torture and often beating her. Today when in the morning he had beaten her, she had told him that it was not possible for her to bear any more and he should kill her. He had, therefore, poured kerosene over her and ignited her with match-stick. She has also clarified that she did not receive burns while preparing tea. The witness has stated that while he was interrogating her, Ramila could understand the questions and could reply them properly. In the cross-examination he has stated that he had met Dr. Bhadja in the burns ward itself. At the time of recording of the dying declaration no relatives of Ramilaben were present. He has also denied the suggestion that at that time father of Ramilaben was present. According to the witness, there were only two cots in the burns ward. On the other cot one old lady was sleeping. He has denied the suggestion that there was no need for him to ask question no. 14 when the other 10 questions were already asked. He has also denied the suggestion that question no. 14 and its answer were written down by him in the dying declaration at the instance of Police Officer.

5.2. The evidence of both the witnesses shows that on 25th December, 1995, the deceased had received burns in her house, in the morning around 7.00 O'clock. She was brought to the hospital. In the hospital she was admitted in the burns ward, where she expired on 27th December, 1995.

5.3. Dr. Sukhdev Kunvardas Ramavat, P W 1 Exh. 6, who has performed autopsy of the dead body of the deceased on 27th December, 1995, has opined that the death was caused on account of shock received due to severe burns. He has produced on record the report of post mortem examination wherein it has been opined that the cause of death was shock due to extensive burns. Thus, there is no manner of doubt that the deceased died due to extensive burns in the hospital where she was taking treatment. At this juncture it would also be relevant for us to refer to dying declaration which has been produced on record at Exh. 17. It is the dying declaration of the deceased. It shows that her age was 25 years. Her marriage had taken place about 9 years prior to the incident. The appellant at the relevant time was working as a labourer in a factory manufacturing roof tiles. In answer to question no. 10 to the effect that how she had received burns, she had answered that on that day in the early morning while she was preparing tea on the primus stove, her clothes caught flame and as a

result of the same she had received burns. She has also stated that at the time when the incident took place, her husband and children were in the room. She has also stated that she was brought to the hospital by her husband. In answer to question no. 16 which was to the effect that whether she had any quarrel with her husband, she has stated that her husband was beating her off and on. She has not received burns due to flame of the primus but in the morning she was severely beaten by her husband and, therefore, she was not able to tolerate it and she told him that she wanted to die; whereupon her husband poured kerosene over her and ignited her with the match-stick, for which she has received burns all over the body.

6. In view of the aforesaid evidence, there is no reason for us to doubt that the death was not accidental. The panchnama of scene of offence shows that there was dampness on the floor which was caused on account of the kerosene. The clothes of the deceased were smelling of kerosene. Had there been any accident, the clothes would not have smelt of kerosene nor it would have got spilled on the ground to such an extent that it would leave dampness in the area of about 2 ft. It shows that kerosene must have been poured on her. It is neither the case of the prosecution nor the defence of the appellant that she herself had poured kerosene over her and ignited her clothes with match-stick. Further if the dying declaration and the complaint given to the police are read, they contained the version regarding appellant having poured the kerosene on her and having ignited her. It is true that so far the history before the Medical Officer is concerned, there is mention regarding accidental burns. But the evidence of the doctor as well as the case papers show that the information to the Medical Officer was given by the relative of the deceased. It is also in the dying declaration that it was the husband of the deceased i.e. present appellant who had brought her to the hospital. Therefore, there is no manner of doubt that information must have been given by him to the Medical Officer. It is but natural that he would not say before the doctor that it was he who was responsible for causing burns to the deceased. The story that she received burns while preparing tea was prompted by none else but the husband i.e. the appellant. It is true that in the dying declaration in answer to question no. 10, she has stated that she had received burns on account of her clothes having caught the flame while preparing tea, but immediately thereafter while answering question no. 14 she has given the details regarding the incident and how it happened. The said version had been

adhered to by the deceased while giving complaint. Considering the facts stated in the panchnama as stated above and also considering the facts that if the relations between the couple were cordial and she had received burns accidentally, there was no need for her to falsely implicate the appellant in the case. It may not be forgotten that she has two minor children. There is, therefore, possibility that with a view to see that the children are not rendered destitute, she might have tried to save her husband, but then the idea of punishing him for ghastly act committed by him seems to have prevailed upon her to tell the truth before the concerned authorities. In the circumstances, suicide is completely ruled out. In our opinion, the burns are also not accidental; but the death that has been caused is purely homicidal. We, therefore, agree with the conclusion drawn by the trial Court on this count.

7. The question now that remains to be decided is whether conviction of the appellant under section 302 of the IPC is proper. It is an admitted position that the deceased and the appellant were staying in a room situated in the estate of Sakarwala factory which manufactures roof tiles. Balubhai Amarsibhai P W 3 Exh. 11 is the owner of it. He has acted as a panch of the panchnamas of the scene of offence and also the seizure of clothes of the deceased. He has stated in his evidence that while he was at his factory, he had received telephone informing him that a lady had received burns. He, therefore, had gone to the factory and instructed his workers to take the injured in a rickshaw to the hospital. He has further stated that the deceased and appellant were working in his factory only for last 4 to 5 days from the date of incident. Though he has been declared hostile, to a substantial extent he has adhered to the contents of the panchnama of the scene of offence. It is, therefore, on record that at the place where the incident occurred they were new comers. Nobody therefore, had much idea whether the relations between them were cordial or otherwise. The defence has nonetheless thrown light on this aspect by examining defence witness, namely D W 1 - Bhikhubhai Devjibhai. He is the father of the deceased. He has stated that about 9 to 10 years prior to the incident they had married and they were staying in his neighbourhood at Jamnagar. They had stayed there for about 7 years and their life was quite happy. According to him, the deceased had never complained about ill-treatment by her husband. He has also stated that the appellant had thereafter shifted to Morbi where he was working as truck cleaner. He worked there for 2 years. Thereafter he was in the employment

in one factory making roof tiles. This witness therefore, clearly states that the relations between the deceased and the appellant were quite cordial for a considerable long time. It, however, appears that subsequently, as commonly happens in that strata of the society, there were some differences between them and on the day of the incident there appears to have a quarrel in the morning itself. It is also in evidence that on account of such quarrel, in exasperation the deceased told the appellant to kill her. In a feat of rage and without any deliberate intention to kill, he appears to have poured kerosene over her and ignited her. The panchnama shows that pieces of the quilt were lying on the floor which have been collected at the time of drawing of panchnama of the scene of offence and which have been seized also. Admittedly no-one was present at the time when the incident took place. The prosecution has not explained how these pieces were lying on the floor.

7.1. The evidence of Ramji Gangaram P W 7 Exh. 22 shows that the appellant had made attempt to put out the fire and in the process his hands were burnt to some extent. It is, therefore, very clear that the appellant had made an attempt to rectify his mistake. Though this witness has been declared hostile, this aspect of his evidence is not challenged by the Learned Public Prosecutor in the cross-examination. In absence of any negative evidence on this aspect or any positive evidence from the prosecution stating that it was someone else, other than the appellant, who had made attempt to save the deceased, we will have to accept this evidence of Ramji Gangaram on this aspect. It may also be noted here that the subsequent conduct of the appellant does not go against him and it is in consonance with the evidence of Ramji Gangaram on the aspect of help rendered to the deceased by the appellant. The evidence shows that he had shifted the deceased to the hospital for treatment. To that extent he has tried to help her. It is a different matter that at the hospital he gave false information, but it is quite natural that he would try to save himself from the clutches of the law. However, if these are the circumstances, then it is possible to say that the incident happened all of a sudden without any premeditation on the part of the appellant and in a feat of rage. He, therefore, cannot be saddled with the intention of either causing death of his wife or the intention of causing such injuries which are sufficient in the ordinary course of nature to cause death. At best it can be said that he did have the knowledge about the consequences of his act. He, therefore, can be saddled

with the knowledge of the act he had committed.

8. In view of the above, the finding of the trial Court holding him guilty of offence under section 302 of the IPC appears to be erroneous. As stated above, the appellant, at best, can be held guilty of committing an offence under section 304 Part-II of the IPC. We, therefore, alter his conviction from that under section 302 of the IPC to one under section 304 Part-II of the IPC. Consequentially the sentence of life imprisonment is also altered to one already undergone by the appellant. The order of fine is maintained. We are informed by Mr. Anandjiwala that by now he has spent about 8 years and 6 months in the prison. In that view of the matter, in our opinion, the ends of justice would meet if the sentence already undergone is imposed upon him.

In the result, the appeal is partly allowed. The appellant is directed to be set at liberty forthwith, if not required for any other purpose.
Muddamal articles to be disposed of in terms of the order of the trial Court.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.